Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 75-1141

WILLIAM M. REESE, SR.,

Defendant-Appellant

V.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WAGGONER CARR

ROBERT L. CRIDER

314 West Eleventh Street
Austin, Texas 78701

ATTORNEYS FOR
PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

WILLIAM M. REESE, SR.,

Defendant-Appellant

V.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES.

William M. Reese, Sr., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on December 10, 1975.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, page 26. The judgment of the United States District Court for the Northern District of Texas, Dallas Division is printed in Appendix A, infra, page 25.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 26) was entered on December 10, 1975. A timely petition for rehearing was denied on January 12, 1976 (Appendix A, infra, page 27). The jurisdiction of the Supreme Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF NOLO CONTENDERE AND NOT ALLOWING THE DEFENDANT A TRIAL BY JURY.

WHETHER THE COURT OF APPEALS FOR THE 5TH CIRCUIT ERRED IN AFFIRMING DEFENDANT-APPELLANT'S CONVICTION AND NOT ORDERING THE TRIAL COURT TO ALLOW THE DEFENDANT-APPELLANT TO WITHDRAW HIS PLEA OF NOLO CONTENDERE. THE RIGHT TO A TRIAL BY JURY IS SO IMPORTANT TO OUR SOCIETY THAT THE COURT SHOULD NOT ALLOW AN INCONVENIENCE TO THE COURT TO PREJUDICE THE RIGHTS OF THE DEFENDANT-APPELLANT TO WITHDRAW A PLEA OF NOLO CONTENDERE/ GUILTY AND ENTER A PLEA OF NOT GUILTY.

STATUTE INVOLVED

Rule 32(d), 18 U.S.C.A., Federal Rules of Criminal Procedure:

"Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE CASE

The United States attorney charged William M. Reese, Sr., Defendant-Appellant below, in criminal contempt of an order of the United States District Court for the Northern District of Texas, Dallas Division. Specifically, it was alleged that the Defendant-Appellant had violated an order that enjoined him and his agents, servants, employees, attorneys, successors and assigns from further violations of section 5(a) and 5(c) of the Securities Act of 1933, as amended [15 U.S.C. 77e(a) and 77e(c)] and section 10(b) of the Security Exchange Act of 1934, as amended [15 U.S.C. 78j(b)] and Rule 10b-5 thereunder [17 CRF 240.10b-5], in the offer or sale of the common stock of Industrial Instrument Corporation, or any other securities. Defendant Reese allegedly offered for sale and did sell common stock of American Southwest Development Corporation for which no registration statement was ever filed with the Security and Exchange Commission and allegedly made false, misleading, and untrue statements in an attempt to sell the above mentioned common stock. Defendant Reese plead nolo contendere to count one of the above charge on May 5, 1975. Defendant timely requested the Court to withdraw the plea of nolo contendere prior to sentencing and the Trial Court refused Defendant's request. From the order refusing the Defendant's request to withdraw his plea of nolo contendere and enter a plea of not guilty this appeal is taken.

REASONS FOR GRANTING WRIT

POINT ONE

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF NOLO CONTENDERE AND NOT ALLOWING THE DEFENDANT A TRIAL BY JURY.

Rule 32(d), 18 U.S.C.A., Federal Rules of Criminal Procedure allows a defendant to withdraw a plea of guilty or of nolo contendere before the imposition of sentence. Defendant in this cause made a timely request to withdraw his plea of nolo contendere, TR 145. In Kercheval v. United States 1926, 274 U.S. 220, 71 L.Ed. 1009, the United States Supreme Court stated: (Page 1012)

> "Other decisions support the petitioner's contention.... We think that contention is sound.... But, on timely application the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence... The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

In Kadwell v. United States, 9th Cir. 1963, 315 F.2d 667, at 670, the Court states:

> "(3) The right of an accused to trial by jury has a favored place in our law. Concern for its protection is reflected in the statutes by which Congress empowered the Supreme Court to promulgate procedural rules for the federal courts. Section

3772 of Title 18 contains an express proviso that the rules of criminal procedure may not 'abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.' No other restriction upon the power of the Supreme Court over the content of the Rules was prescribed by Congress.

"[3] Accordingly, Rule 32(d) imposes no limitation upon the withdrawal of a guilty plea before sentence is imposed, and such leave 'should be freely allowed'. Poole v. United States, 102 U.S.App.D.C. 71, 250 F.2d 396, 400 (1957). See also Gearhart v. United States, 106 U.S.App.D.C. 270, 272 F.2d 499, 502 (1959). On the other hand, withdrawal of a guilty plea after sentence is conditioned by Rule 32(d) upon a showing of 'manifest injustice'. This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience of court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

"Appellant's motion to withdraw his plea was submitted before sentencing and within three days of his plea of guilty. It was therefore to be freely allowed."

See Footnote 12, Kadwell v. United States, supra, at 315 F.2d 670, where the Court stated:

"12. The colloquy between court and counsel (note 2) suggests that the court may have applied the more exacting standard applicable to motions filed after sentence.... Guilty or innocence is not relevant, however, in the determination of a motion to withdraw a guilty plea before sentence. See Poole v. United States, 102 U.S.App.D.C. 71, 250 F.2d 396, 400 (1957). 'Where the accused seeks to withdraw his plea of guilty before sentencing, on the ground that he has a defense to the charge, the District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt of innocence of the defendant.' Gearhart v. United States, 106 U.S.App.D.C. 270, 272 F.2d 499, 502 (1959)." (Emphasis supplied).

It is respectfully submitted that the defendant believes that he is innocent of any criminal contempt as charged in the information of this cause, Counts 1 and 2 inclusive; that he has a defense which will clear his name, and that he would like to submit the same to the Court and jury under a plea of Not Guilty. In addition thereto, based upon the decision of IN RE JOYCE, before the Honorable Thornberry, Goldbery and Godbold, Circuit Judges, U.S. Court of Appeals, 5th Cir., No. 74-1543, decided January 9, 1975, TR 149-155, this defendant did not perform a contemptuous act, and did

not have a willful, contumacious, or reckless state of mind sufficient to justify a criminal contempt conviction for failure to comply with the court order charged in the information against the defendant. Judge Thornberry states in this opinion:

> "[5] The general power of a federal court to punish for criminal contempt is found in 18 U.S.C. Sec. 401, which authorizes a fine or imprisonment, in the court's discretion, for '[d] disobedience or resistance to its lawful writ, process, order, rule, decreee, or command.' Engrafted upon this language is the requirement of both a contemptuous act and a willful, contumacious, or reckless state of mind. In Re Farquhar, 1973, 160 U.S.App.D.C. 295, 492 F.2d 561, 564; Sykes v. United States, 1971, 144, U.S.App.D.C. 53, 444 F.2d 928, 930."

Also, see United States v. Lansky, 5th Cir., 1974, 496 F.2d 1063.

In United States v. Joslin, U.S.C.A., D.C. 1970, 434, F.2d 526, the court stated: (531)

> "[5,6] For these reasons, we vacate the trial court's order denying the motion to withdraw the guilty pleas.... The general standard to be applied (the request for leave to withdraw having come prior to sentence) is whether 'for any reason the granting of the privilege seems fair and just'. Kercheval v. United States, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927); Gearhart v. United States, 106 U.S.App.D.C. 270, 273, 272 F.2d 499, 502 (1959). If the request was

> made because appellant thought he had a defense, permission to withdraw 'should be rather freely granted.' High v. United States, 110 U.S.App. D.C. 25, 29, 288 F.2d 427, 430-431, cert. denied, 366 U.S. 923, 81 S.Ct. 1350, 6 L.Ed.2d 383 (1961).... the District Court should grant a Government motion to reinstate the 10 counts of the indictment which were dismissed after acceptance of the guilty pleas."

We would further urge the Court to consider the mental and physical condition of the defendant at the time he entered his plea of nolo contendere. The Defendant had just recently been subjected to the rigors of a bankruptcy proceeding. He had his house on the market so that he could pay his costs of defending himself and had further suffered some reverses in the Trial Court that had a great bearing on his ability to defend himself. Specifically, on page 11 of the Hearing on Motions, November 8, 1974, the government successfully argued to the Trial Court that the Defendant was not entitled to the protection of the Fourth or Fifth Amendment to the United States Constitution. The rationale for this argument was that the records of both the defendant and the American Southwest Development Corporation were being held by a third party and they were obtained pursuant to a valid discovery order. The fact is the third party was the defendant's landlord, and the Fuentes v. Shevin doctrine applied. The defendant was entitled to a court hearing before being deprived of his property. The landlord held the records in trust and should not have delivered them to the government. Couch v. United States, 409 U.S. 327 (1973). The Defendant would further show the Court that according to the uncontroverted testimony of Mr. Bruce Baldwin, the SEC through

its agent, Dan Kirschbaum (page 31, Hearing on Motions, November 8, 1974) intended to secure the records for the expressed purpose of determining whether or not the defendant had committed a criminal offense, to-wit: taken and pocketed One Hundred and Sixty Thousand Dollars for his own benefit. Since the government was engaged in a criminal investigation, they were not entitled to use the liberal Federal Rules of Civil Procedure to obtain evidence in a criminal trial.

In the event it has not been made clear in the foregoing paragraph, the defendant's position is that a subpoena duces tecum is subject to all of the same Constitutional restrictions as a warrantless search or search under warrant. It is said:

> "The compelled production of one's private books and papers through a subpoena duces tecum for use against him in a criminal proceeding, is, of course, as much within the guaranty of the Fourth Amendment against unreasonable search and seizure as is a reaching of them by means of warrant." Boyd v. United States, 116 U.S. 616, 61 S.Ct. 524, 29 L.Ed. 741.

The Government can, therefore, no more compel production of incriminating evidence from the defendant by subpoena than could such evidence be obtained by warrant. It is the position of the defendant herein that the property which was seized was solely evidentiary. The Courts have often held items cannot be seized of evidentiary value only, including, for example, files, tax returns, tax control sheets, powers of attorney, personal records, uncashed government checks in a forgery of Government check

violation. Gilbert v. U.S., 291 F.2d 586 (CA 1961), reversed on other grounds, 370 U.S. 650, 82 S.Ct. 1399, 8 L.Ed. 750.

It has been said that the only property subject to search and seizure is: (1) means and instruments of committing a criminal offense, (2) fruits of crime, (3) weapons of escape, and (4) contraband. Federal Searches and Seizures, Davis, Charles C. Thomas, 1965.

Defendant would also show the Court that the government intended to utilize other tainted evidence in the form of allegedly electronic telephone conversations. The government further denied having any knowledge whatsoever of any government agency engaging in wiretapping, eavesdropping or electronic surveillance of the defendant or his attorneys. An investigation of these tapes allegedly made by the parties to the conversations reveal that on the R. White tape the telephone can be heard ringing. Not the sound of the buzz heard by the party initiating the call (Lt.White) but the ring heard in the room where the receiver is located. The tape was tampered with or a bugging device other than a wiretap was present in the defendant's office. Either the illegal intrusion in a constitutionally protected area, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 576 (1967) or the tampering of evidence is sufficient to exclude these tapes. On the Meeker tapes, a voice identifies itself as Meeker and proceeds to state that the following three conversations were recorded on three separate dates and then there follows three conversations. Obviously, this tape was recorded at a later date. Neither the defendant nor the government can ascertain whether or not these tapes are the actual recordings of the conversations in question.

Obviously, the government has the duty to refrain from using evidence where the accuracy or truthfulness of the evidence cannot be determined.

The Defendant testified, page 9 Hearing on Motion to Withdraw Plea, May 9, 1975, that he was very nervous, completely exhausted and taking medication (15 aspirin). On Page 9 he stated he did not have a clear mind. The government controverted his testimony with Dr. Leo Peters, who stated clearly, Statement of Fact, page 63, that he had never examined the defendant. He stated that he did not know the defendant's physical condition, and further, that he had not seen the defendant on the date he entered his plea of nolo contendere. Dr. Peters cannot and did not offer any testimony concerning the Defendant's condition at the time he entered his plea; however, he did state that the effect of taking too much aspirin is a change in hearing, hyperexcitability and apprehension. The only witness offered by the government who actually saw the defendant on May 5, 1975, was Albert Stevenson (Statement of Fact, page 67). Mr. Stevenson is a probation officer, not a doctor. He does not have the qualifications to determine the physical or mental condition of the defendant.

The cumulative effect of all the foregoing pressures on the defendant, plus the apprehension of a pending state criminal trial on the same grounds that was scheduled to start on May 12, 1975, was such that the defendant was unable to make a knowledgeable decision concerning the changing of his plea. The only assertable position for not returning this case for trial on the merits is inconvenience to the government. In Kadwell, supra, the Court stated that the right to trial by jury has a favored place

in our society. The rights of the accused should not be barred by mere inconvenience to the government, however, it appears that this is the grounds for denying the Defendant's Motion to Withdraw his plea of nolo contendere. The Trial Court stated that the defendant was playing games with the court, Statement of Fact, Hearing on Motion to Withdraw Plea, May 9, 1975, page 93, and again during Statement of Fact Sentencing Proceedings, June 13, 1975; page 21 (...have done everything in the world to avoid the moment of truth); page 22 (The court has given you every consideration in the world in delaying the trial); page 24 (... you got the time by the trial date); page 25 (Well as I say you have done everything in the world to delay). Yet by the government's own motion (TR 42), the government quotes the authority of United States v. Rundle, 230 F.Sup. 323 (E.D. Pa. 1964). In Rundle the facts were almost identical to this case and the Trial Court was upheld when he appointed the defendant an attorney and proceeded to trial. The Trial Court did not have to allow any of the attorneys to withdraw or to allow the defendant additional delays.

POINT TWO

WHETHER THE COURT OF APPEALS FOR THE 5TH CIRCUIT ERRED IN AFFIRMING DEFENDANT-APPELLANT'S CONVICTION AND NOT ORDERING THE TRIAL COURT TO ALLOW THE DEFENDANT-APPELLANT TO WITHDRAW HIS PLEA OF NOLO CONTENDERE. THE RIGHT TO A TRIAL BY JURY IS SO IMPORTANT TO OUR SOCIETY THAT THE COURT SHOULD NOT ALLOW AN INCONVENIENCE TO THE COURT TO PREJUDICE THE RIGHTS OF THE DEFENDANT-APPELLANT TO WITHDRAW A PLEA OF NOLO CONTENDERE/ GUILTY AND ENTER A PLEA OF NOT GUILTY.

The Government in their brief made an extensive argument that Defendant-Appellant was represented by no less than five (5) attorneys during the interim between the filing of the action and the entry of the plea. The government also stated that the events which occurred during this period are essential to a resolution of the issue presented and there is no dispute as to the series of events (Gov. Brief page 4), Defendant-Appellant contends this is not an accurate statement of the facts.

Mr. William F. Alexander represented Defendant-Appellant at Defendant-Appellant's arraignment on June 7, 1974. During this hearing Mr. Alexander asked the Government for a statement of facts before entering a plea. Judge Taylor recessed the hearing so that the Government and Defendant-Appellant could complete their plea bargaining negotiations. This recess was agreed to by the Government (Mr. William F. Sanderson) (SF June 7, 1974, page 7). On July 22, 1974, before Judge Taylor, the arraignment hearing was again convened. Mr. Alexander announced that the Defendant-Appellant was prepared to enter a plea of nolo contendere in return for

a fine and no imprisonment. The Government through Mr. Sanderson advised the Court that the Government had no objection to the conditions (SF July 22, 1974, page 2). During this hearing Defendant-Appellant and Mr. Alexander consulted on the terms and conditions the Government required in return for acceptance of the plea of nolo contendere. The pertinent conditions required Defendant-Appellant to sign an instrument admitting he had committed fraud. This he refused to do. Following this conference, Mr. Alexander requested permission of the Court to withdraw on the basis of an irreconcilable difference of opinion between Mr. Alexander and Defendant-Appellant (SF July 22, 1975, page 5). Permission was granted by the Trial Court.

Following Mr. Alexander's withdrawal, Defendant-Appellant hired Mr. Guilford Jones of Big Spring. Mr. Jones represented Defendant-Appellant during a hearing on Motions, November 8, 1974. During this hearing, the Trial Court was urged to suppress evidence illegally obtained by subpoena duces tecum. This request was denied. However, the Government was ordered to make copies of the documents they intended to use during the trial on the merits available to the defense. Further, under questioning by the Trial Court, the Government admitted that the records in their possession were voluminous. The Trial Court was also advised that two additional boxes of records were being held by the Clerk of the Court or the Marshall. Obviously, with this many records available the defense was entitled additional time to prepare for trial.

Following this hearing on the 8th of November, 1974, to give Defendant-Appellant notice that he would now be tried as a serious offense rather than a petty offense,

(TR of November 18, 1974, 2-4). During this hearing, the Defendant-Appellant entered a plea of not guilty and asked for a continuance. The grounds for the continuance were twofold: (1) The Government had not produced until this late date the various large boxes of documents subpoenaed several months earlier by the Government and that the Court had ordered turned over to the defense on November 8, 1974; and (2) The Government made available a transcript of four (4) to six(4) hours of telephone conversations allegedly between the Defendant-Appellant and a Government witness. The volume of material presented to the defense at such a late date was such that an adequate defense simply could not be presented on the scheduled trial date. The Government's attorneys had withheld documentary evidence from the defense for over five (5) months and should not now suggest that the delays in this cause were solely the fault of the Defendant-Appellant.

After Mr. Jones had worked for several months preparing the defense, he requested the Defendant-Appellant hire additional legal assistance with more experience in the Securities Exchange field. Arrangements were made to have Mr. Emmett Colvin and his partner Gary Jackson join the defense team. The Court did convene on January 30, 1975, as stated in the Government brief at page 6, but not for the purpose of a trial on the merits as implied in Plaintiff-Appellee's brief but for hearings on pre-trial motions. During this hearing, the Trial Court announced that it had information that Mr. Jones was withdrawing from the case. The Court stated that it ordinarily permits attorneys to withdraw when they request, because when they reach that point, they are really not in much shape to represent the client (SF

January 30, 1975, page 20). However, the Defendant did not advise the Trial Court at this time (and now realizes that this was a mistake) that the agreement to the withdrawal was just as lead attorney. Mr. Jones was still going to advise in the defense. He had had three months to study the documents and the transcripts of the tapes and Mr. Colvin and Mr. Jackson had only a few days. It was only later that the Defendant-Appellant became aware that Mr. Jones did not intend to participate in any manner.

On February 3, 1975, when this cause was called for a trial on the merits, both the attorneys and the Defendant-Appellant had filed Motions for postponement. It was at this time Defendant informed the Court that he had agreed to release Mr. Jones in return for an agreement that Mr. Jones would continue to assist in the defense on a part time basis. When Mr. Jones was not present, Defendant-Appellant expected Mr. Milstead, his partner, to be present. This was imperative because of the volume of documentary evidence in this case. Mr. Colvin and Mr. Jackson simply had not had time to review this information during the short period they were in the case. Mr. Colvin had filed a motion for withdrawal which stated that an irreconcilable difference of opinion had developed between him and Defendant-Appellant. Defendant-Appellant still maintained his innocence and refused to enter a guilty plea (SF February 3, 1975, page 14). This motion was granted and case was recessed until March 24, 1975.

Mr. Leonard Choate replaced Mr. Colvin and asked the Court for additional time to prepare. This motion was granted and the case was reconvened on May 2, 1975 for

hearing on Motions without Defendant-Appellant present. During this hearing on Defendant-Appellant's application under Rule 17(b) the Trial Court was advised that Defendant-Appellant was involved in a bankruptcy hearing that day. The purpose of the hearing before Judge Taylor was to ask the Court to allow the Defendant-Appellant to proceed without further costs since he was bankrupt. The Government opposed the defense motion on the basis of the Defendant-Appellant's 1971 statement of financial condition which was four (4) years old (SF May 2, 1975, page 6) and the value of his home and car. The fact that Mr. Reese's home was on the market for sale and that he offered to reimburse the Government for the expenses of having these witnesses available when the house was sold was not given great consideration by the Trial Court. The Trial Court delayed a decision on this matter until Monday, May 5, 1975, the day of the trial on the merits on the basis that this was a matter where Defendant-Appellant should be present even though the rules authorize this motion ex parte.

A careful review of the record shows quite clearly that the Government was responsible for a considerable amount of the delay in this cause. The Government had impounded all of Defendant-Appellant's records, which were voluminous, in February, 1974. Defendant-Appellant made a motion to suppress the subpoena duces tecum where the Government acquired those records; a motion to suppress the evidence and return Defendant-Appellant's records was made October 1, 1974. The records were made available to defense counsel at fifty cents ($0.50) per copy, which was prohibitive and unreasonable. Only on November 8, 1974 was relief granted

so that Defendant-Appellant could have access to his own records and prepare for trial. In no way should this delay be charged against Defendant-Appellant. In the first instance, they effectively withheld documents by failing to provide copies to the defense. The Government attempts to excuse its conduct by making the documents available during normal business hours, in Ft. Worth, however, they failed to mention the fifty cents ($0.50) per copy charge. It seems strange the Defendant-Appellant would have to buy copies of his own records to defend himself in a Federal Court. Only after being ordered by the Trial Court did the Government surrender these documents. These documents in several large boxes were delivered on November 13, 1974 and the trial was to begin the next week. It is unjust and appalling for the Government to complain of a continuance when the defense has limited preparation time because of the Government's foot dragging conduct. (Gov. Brief, page 6).

Defendant-Appellant would further show the Court that the contention of the Government that the District Court did not abuse its discretion in refusing the Defendant-Appellant's motion to withdraw his plea of nolo contendere, is without merit. (Gov. Brief, page 14).

The Government accepts "the general principle" that Rule 32(d) of the Federal Rules of Criminal Procedure should be construed liberally in favor of the accused when a motion is made to withdraw (a plea) before sentence is imposed. (Gov. Brief, page 14). The Government has stated the Defendant-Appellant does not seriously contend that he did not understand the nature of the charges against him or the possible penalty upon conviction and this

statement is quite correct. In fact, the Defendant-Appellant never made any such assertion and is not suggesting to the Court any such thing at this time. All the Defendant-Appellant has ever stated to this Court and the Trial Court is that "at the time he entered his plea of nolo contendere, he was not in a mental or physical condition to enter such plea and should have been allowed to withdraw the plea and proceed to trial". This is the point of this appeal and Defendant-Appellant asks this Court to carefully consider some of the factors bearing on the Defendant-Appellant at the time the plea was entered.

1. On the Friday prior to the date on entering his plea, Defendant-Appellant was subjected to a lengthy meeting of his creditors in Bankruptcy Court.

2. On the Friday prior to Defendant-Appellant entering his plea, the Trial Court refused to approve Defendant-Appellant's request under Rule 17(b) for Government assistance in securing witnesses and subpoenas for his defense.

3. Defendant-Appellant was forced to sell his home valued at One Hundred Fifty Thousand and No/100 Dollars ($150,000.00) for the purpose of meeting the cost of his defense. The loss of a person's home only four (4) years after having a statement of financial condition showing a net worth of Two Million Eight Hundred Eighty-one Thousand Four Hundred Forty-five and 34/100 Dollars ($2,881.445.34) does have an effect on his mental well being.

4. Defendant-Appellant was faced with the possibility of controverting evidence that had been illegally obtained

by a subpoena duces tecum and doctored telephone tapes.

5. On May 3, 1975, just prior to the trial on the merits, Mr. Leonard Choate informed the Defendant-Appellant that he was not a SEC lawyer but would do the best he could.

CONCLUSION

The defendant because of exhaustion, nervousness, and medication was unable to make an intelligent and knowledgeable decision concerning his change of Plea. His request to withdraw his plea of nolo contendere and enter a plea of not guilty was timely made prior to the imposition of sentence. The Trial Court should have granted the defendant's Motion to Withdraw plea and proceeded to trial. The right of an accused to a trial by jury is valuable, that it should never be barred on the basis of inconvenience to the government. It is only just and fair that this writ for certiorari be granted and that this cause be placed on the calendar for oral argument and that the Court order the Clerk to advise Defendant-Appellant of the results of this Petition.

Respectfully submitted,

Waggoner Carr

Robert L. Crider

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ATTORNEYS FOR
DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I, Robert L. Crider, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been mailed to the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans and to Mr. William O. Wuester, Assistant U.S. Attorney, U.S. Courthouse, Room 310, Fort Worth, Texas 76102, on this the 10th day of February, 1976.

Robert L. Crider

Robert L. Crider
Waggoner Carr

A P P E N D I X A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CRIMINAL
	§	NO. 3-74-514
WILLIAM M. REESE, SR.	§	

O R D E R

On May 9, 1975, a hearing was held on Defendant's Motion to Withdraw Plea of Nolo Contendere entered on May 5, 1975. The Court having heard the evidence and witnesses presented by both Defendant and the Government, and premises considered,

It is hereby ORDERED, ADJUDGED and DECREED that the Motion to Withdraw the Plea of Nolo Contendere is denied.

ENTERED this 16th day of May, 1975.

/S/ W. M. TAYLOR, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 75-2587
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM M. REESE, SR.,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

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(December 10, 1975)

BEFORE THORNBERRY, MORGAN and RONEY, Circuit Judges.
PER CURIAM. AFFIRMED. See Local Rule 21.1

Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2587

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM M. REESE, SR.,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Northern District of Texas

- - - - -

ON PETITION FOR REHEARING

(JANUARY 12, 1976)

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Supreme Court, U. S.
FILED
MAY 6 1976
MICHAEL RODAK, JR., CLERK

No. 75-1141

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM M. REESE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINIONS BELOW

Neither the *per curiam* opinion of the court of appeals (Pet. App. A 26) nor the order of the district court (Pet. App. A 25) is reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975. A petition for rehearing was denied on January 12, 1976 (Pet. App. A 27). The petition for a writ of certiorari was filed on February 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied petitioner's pre-sentence motion to withdraw his plea of *nolo contendere*.

STATEMENT

An information filed on May 3, 1974, in the United States District Court for the Northern District of Texas charged petitioner with two counts of criminal contempt, in violation of 18 U.S.C. 401. Petitioner was accused of willfully disobeying a court order permanently enjoining him from violating the registration provisions of the Securities Act of 1933, 15 U.S.C. 77e(a) and 77e(c), and the anti-fraud provision of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and 17 C.F.R. 240.10b-5, in connection with the offer and sale of the common stock of the Industrial Instrument Corporation or of any other securities.[1] Approximately one year later, after petitioner had obtained repeated postponements of his trial, he entered a plea of *nolo contendere*, which the district court accepted. On the following day, however, petitioner moved to withdraw his plea. After a hearing, the court denied that motion (Pet. App. A 25). On June 13, 1975, prior to sentencing, petitioner again moved to withdraw his plea. After a second hearing, the court again denied the motion. Petitioner was fined $1,000 and sentenced to two years' imprisonment, all but six months of which were suspended. The court of appeals affirmed (Pet. App. A 26).

1. At petitioner's arraignment on June 7, 1974, his retained counsel informed the court that petitioner might

[1]The information charged petitioner with renewed violations of these provisions of the federal securities laws in connection with the offer and sale of the common stock of American Southwest Development Corporation. These acts and practices had previously been the basis for a civil injunctive action filed by the Securities and Exchange Commission on May 22, 1973. *Securities and Exchange Commission* v. *American Southwest Development Corporation, et al.*, N.D. Tex., No. CA 3-7226-C. Without admitting or denying the allegations in the Commission's complaint in that action, petitioner had consented to the entry of an order permanently enjoining him for the second time from violating the federal securities laws.

be willing to enter a plea of guilty if a satisfactory understanding could be reached with the government (Transcript of June 7, 1974, pp. 4-6). The court then recessed the arraignment to permit counsel "to complete [his] negotiations" (*id.* at 7). At a second arraignment on July 22, 1974, counsel informed the court that after careful examination of the information, petitioner had decided to plead *nolo contendere*, since he "did not wish to burden this Court with a trial on a plea of not guilty" (Transcript of July 22, 1974, p. 3). However, petitioner asked to confer with his attorney in private. After a short recess, counsel informed the court that an "irreconcilable [difference of] opinion has come up between me and [petitioner]" and asked to be permitted to withdraw from the case (*id.* at 5). The court duly recessed the proceedings to allow petitioner to obtain new counsel.

At his arraignment on November 13, 1974, petitioner pleaded not guilty.[2] Although the trial was scheduled to begin the following week, petitioner's counsel requested and was granted a continuance in order to inspect documentary evidence in the government's possession (Transcript of November 13, 1974, pp. 4-8). When the case was called on January 30, 1975, petitioner was represented by a third set of attorneys. Upon petitioner's assurance that he wished the new attorneys to represent him, the court permitted his former attorneys to withdraw their representation. The trial was then scheduled for the following Monday.

[2]At the first arraignment hearing, petitioner was informed that he had been charged with a "petty offense" carrying a maximum penalty of 6 months' imprisonment and a $500 fine on each count. Subsequently, a new information was filed which charged petitioner with a "serious offense". At his arraignment, petitioner acknowledged that he understood that he could receive a sentence of up to ten years' imprisonment on these charges (Transcript of November, 13, 1974, pp. 2-3).

On that day, however, petitioner requested a further postponement of the trial on the ground of irreconcilable differences with his most recent counsel concerning the proper method of conducting his defense (Transcript of February 3, 1975, p. 14). Petitioner claimed that his second attorney had brought his present counsel into the case without his consent. He insisted that he wanted counsel of his own choosing and promised to move expeditiously to obtain representation if the trial were postponed (*id.* at 4-5, 13). Although stating that it was exasperated with petitioner's "game playing with the Court" (*id.* at 17), the district court nonetheless granted the continuance and set the case for trial in approximately two months. The government had to excuse its witnesses, who had been brought to Texas from Kansas, New York, and Washington, D.C. (*id.* at 19).

Petitioner subsequently retained a fourth attorney and obtained a further postponement of the trial to allow adequate preparation of his defense.

2. On the morning of the ultimate trial date, May 5, 1975, a jury panel and the government witnesses were again assembled in the courtroom. Petitioner's attorney informed the court that petitioner wished to plead *nolo contendere*, provided that he was "given a probated sentence" (Transcript of May 9, 1975, p. 30). The prosecutor warned counsel that "there would be no promise or recommendation of probation" (*id.* at 23). The court similarly stated that it "could make no [such] agreement" and instructed counsel to discuss the matter with petitioner (*id.* at 54-55).

When court reconvened that afternoon, counsel stated that petitioner desired "to change his plea to *nolo contendere* on Count One * * * [upon] the government's agreement to dismiss Count Two" (Transcript of May 5, 1975, p. 3). Pursuant to Rule 11, Fed. R. Crim. P., the court

asked petitioner whether he understood the charges against him; whether he appreciated that the court would find him guilty upon a plea of *nolo contendere* and that the court alone would fix punishment; whether he was entering the plea freely and voluntarily; and whether the government had threatened him or promised him anything except dismissal of the second charge (*id.* at 7-9). Petitioner responded appropriately to each question. At the government's request, petitioner was sworn as a witness and was asked essentially the same questions, to which he gave similar responses (*id.* at 11-12). The court thereupon accepted his plea and deferred sentencing (*id.* at 12-15).

On the following day, prior to the imposition of sentence, petitioner moved to withdraw his plea under Rule 32(d), Fed. R. Crim. P. The district court denied that motion, and the court of appeals affirmed.

ARGUMENT

Petitioner contends (Pet. 5) that the district court erred in denying his pre-sentence motion to withdraw his plea of *nolo contendere*. He argues (Pet. 9, 12, 20) that his plea was not knowingly and voluntarily entered due to the cumulative effect of his financial, physical, and emotional problems at that time.

Although a pre-sentence motion to withdraw a plea of guilty or *nolo contendere* should be granted "if for any reason the granting of the privilege seems fair and just", *Kercheval* v. *United States*, 274 U.S. 220, 224, such motions are addressed to the sound discretion of the trial court, and its determination is reversible only upon a showing of abuse of discretion. *E.g.*, *United States* v. *Presley*, 478 F. 2d 163, 166 (C.A. 5); *United States* v. *Vallejo*, 476 F. 2d 667, 669 (C.A. 3); *United States* v. *Lombardozzi*, 436 F. 2d 878, 881 (C.A. 2), certiorari denied, 402 U.S. 908.

In the instant case, the trial judge (who had presided over this case from the beginning) twice conducted hearings on petitioner's motion and rejected his claim that his plea had been entered involuntarily. The court concluded that the motion to withdraw the plea was nothing more than the latest in a labyrinthine series of efforts by petitioner "to avoid the moment of truth" (Transcript of June 13, 1975, p. 21). This conclusion, in which the court of appeals implicitly concurred, is amply supported by the record and does not warrant further review by this Court.

a. At the hearing on his motion, petitioner asserted that he had not had "a clear mind" and was "at the point of collapse" at the time he entered his plea (Transcript of May 9, 1975, pp. 8-9). But the probation officer who interviewed petitioner immediately after he entered the plea testified that petitioner had appeared "rational and * * * lucid" and had stated specifically that he was not under a physician's care or taking any medication at that time (*id.* at 70) . The trial judge, who had examined petitioner in detail at the time of his plea, also found that petitioner had been "perfectly clear and lucid [,] and I was convinced that you understood and knew everything I was saying and that the lawyers [said] * * * " (*id.* at 58, 92).[3]

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[3]For instance, the court engaged petitioner in the following colloquy (Transcript of May 5, 1975, pp. 11-12):

THE COURT: Has anyone forced you in any way to make this plea?

THE DEFENDANT: No sir, they have not.

THE COURT: Has anyone offered you any favor, or any reward?

THE DEFENDANT: No, sir.

THE COURT: You have done it solely—or freely and voluntarily?

THE DEFENDANT: Absolutely.

THE COURT: And do wish to proceed on that basis?

THE DEFENDANT: Yes, sir.

Moreover, in denying petitioner's motion, the district court properly considered the chain of events prior to the entry of the *nolo contendere* plea. Those proceedings refute any suggestion that petitioner entered his plea without a complete understanding of its consequences and fully justify the court's conclusion that, in seeking to withdraw his plea, petitioner was merely continuing his efforts to delay resolution of his case. Nearly eleven months had elapsed by then between petitioner's initial arraignment hearing and his change of plea on the ultimate day set for trial. During that period, petitioner had retained four sets of attorneys and had obtained numerous continuances to enable successive counsel to analyze his position. While petitioner may have disagreed with his attorneys over the proper manner of asserting his defenses, that fact itself strongly indicates that his decision to plead *nolo contendere* was well-considered and intelligently made. See *United States* v. *Komitor,* 392 F. 2d 520, 521 (C.A. 2). The courts below therefore properly rejected petitioner's attempt further to retard the disposition of this litigation by withdrawing his plea.

b. That petitioner now contends that he is innocent of the charges underlying the information (Pet. 7) is not dispositive of whether the district court abused its discretion in refusing to allow the withdrawal of his plea. See *Kercheval* v. *United States, supra,* 274 U.S. at 224. While such an assertion is an important factor to be considered by the court in passing upon a Rule 32(d) motion, "[w]ere mere assertion of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right." *United States* v. *Barker,* 514 F. 2d 208, 220-221 (C.A. D.C.), certiorari denied, 421 U.S. 1013. Except for petitioner's claims regarding his "mental and physical condition", which were rejected by the district court, he suggests nothing to indicate that his

decision to enter the plea did not take into account those defenses he now asserts. Correspondingly, it is no argument at this stage to allege (Pet. 10-11) that evidence against petitioner was illegally obtained. Petitioner was convicted not upon evidence presented against him but upon his voluntary plea of *nolo contendere*. See *Tollett* v. *Henderson*, 411 U.S. 258, 267; *United States* v. *Ptomey*, 366 F. 2d 759, 760 (C.A. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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MAY 1976.